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In the

Supreme Court of the United States

October Term, 1996

JAMES E. GILBERT, *et al.*

Petitioners,

v.

RICHARD J. HOMAR,

Respondent.

On Writ of Certiorari
To the United States Court of Appeals
For the Third Circuit

BRIEF OF THE STATES OF ALABAMA, ARIZONA, ARKANSAS, CALIFORNIA, DELAWARE, FLORIDA, GEORGIA, HAWAII, IDAHO, KANSAS, MASSACHUSETTS, MINNESOTA, MISSISSIPPI, MONTANA, NEBRASKA, NEVADA, NEW YORK, NORTH CAROLINA, OHIO, OKLAHOMA, OREGON, RHODE ISLAND, TENNESSEE, TEXAS AND UTAH, AND THE TERRITORY OF THE VIRGIN ISLANDS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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The amici curiae states and territory, through their undersigned attorneys general, respectfully submit this brief in support of petitioners.

INTEREST OF THE AMICI CURIAE

State governments and their political subdivisions are among the nation's largest employers. As such, they frequently have to grapple with the problem of employees who abuse their positions, commit crimes or engage in other misconduct. Handling such situations is difficult for any employer, and the appropriate response depends upon a variety of considerations. The decision below strictly limits the states' discretion in this regard, forbidding them from ever suspending an employee without pay immediately after obtaining strong evidence of the employee's wrongdoing unless they conduct a preliminary hearing.

The 26 amici states and territory have a direct interest in this case because that blanket rule, if accepted by this Court, would considerably hamstring the states' efforts to control their workplaces, threaten the public safety, diminish their credibility in the eyes of the public and cause significant budgetary and morale problems. The Due Process Clause provides an indispensable floor on procedures states must provide their employees, but it has heretofore been understood to be a flexible concept capable of accommodating the gamut of circumstances. When an employee charged with important public service duties commits egregious wrongdoing, the Due Process Clause should not be construed to bar, in all cases, a state from immediately imposing the sanction of suspension without pay pending a post-suspension hearing.

SUMMARY OF ARGUMENT

A. A blanket rule barring states from ever suspending employees without pay absent a pre-suspension hearing conflicts with this Court's due process jurisprudence. The Court has long held that due process is a flexible concept; the sufficiency of procedures is determined on a case-by-case basis after weighing the private interests, the risk of erroneous deprivation and the governmental interests. *See Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976).

B. In certain limited situations -- where the government needs to act immediately to protect the public interest and acts on strong evidence -- the *Eldridge* factors weigh in favor of summary deprivations of private interests. Accordingly, this Court has held that post-deprivation procedures alone can be adequate, and has upheld the suspension from work without a prior hearing of persons charged with wrongdoing. *See Federal Deposit Ins. Corp. v. Mallen*, 486 U.S. 230, 240-41 (1988); *Barry v. Barchi*, 443 U.S. 55, 64-66 (1979).

C. The proposed blanket rule carves out an exception to the *Eldridge* balancing test for the deprivation of wages without a prior hearing. No decision of this Court establishes such an exception. The court below relied solely upon inconclusive *dicta* in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), a case which recognized the occasional appropriateness of summary government actions. *Id.* at 542 n.7. Moreover, there is no sound reason to create a blanket rule shielding employee's wages from temporary interruptions without a prior hearing. Wages are not intrinsically more important than various other private interests which the Court has held can be adequately protected by post-deprivation

procedures. And the availability of backpay generally mitigates the private interest in wages.

The proposed blanket rule is premised on the erroneous assumption that governments have only a minor interest in the cost of paying suspended employees. In fact, state and local governments and departments operate on tight budgets and often cannot pay a suspended employee plus a temporary replacement for the suspended employee. As a consequence, the court below's decision would force many state and local police, fire and other departments to choose between utilizing employees who have engaged in wrongdoing or being understaffed. Paying suspended employees also harms governments by alienating those employees still on the job, and by undermining public confidence in the government.

D. Were the *Eldridge* balancing test applied in this case, the state's actions would have been upheld. The suspension followed an arrest based on probable cause, reducing the risk of erroneous deprivation; the government interest in maintaining a well-run police force is compelling; and the private interest was mitigated by the availability of backpay.

ARGUMENT

THE DUE PROCESS CLAUSE DOES NOT IMPOSE A BLANKET RULE BARRING STATES FROM EVER SUSPENDING THEIR EMPLOYEES WITHOUT PAY ABSENT A PRE-SUSPENSION HEARING

A. This Court Has Long Held That The Requirements Of The Due Process Clause Are Flexible And Depend Upon A Case-By-Case Analysis

By its very nature, the determination whether the government has afforded an individual sufficient procedures to satisfy the Due Process Clause must be made on a case-by-case basis. There are myriad permutations of governmental interests, evidentiary support for government action, private interests, and pre-deprivation and post-deprivation procedures. For this reason, this Court has recognized that "'due process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place, and circumstance." *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (quoting *Cafeteria and Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 (1961)). Rather, "due process is flexible and calls for such procedural protections as the particular situation demands." *Id.* (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

This has not meant, of course, that the due process analysis has been standardless or arbitrary. The Court in *Eldridge* summarized due process jurisprudence as requiring the consideration of three factors in determining whether adequate process has been provided: the private interest; the risk of

erroneous deprivation of that interest through the procedures used, and the probable benefit of additional or substitute safeguards; and the government's interest. 424 U.S. at 335. This three-part test has been applied by this Court and lower courts for the past twenty years to a wide array of situations ranging from the discipline of school children, *Ingraham v. Wright*, 430 U.S. 651, 675 (1977), to parental termination proceedings, *Lassiter v. Department of Social Servs.*, 452 U.S. 18, 27 (1981), to the discharge of state employees, *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433-35 (1982). Adoption of the blanket rule proposed by the court below would be a marked departure from this well-established approach to procedural due process cases.

B. Post-Deprivation Proceedings Alone Have Often Been Held To Satisfy Due Process

When a state conducts a hearing prior to depriving a person of a liberty or property interest, the risk of erroneous deprivation is often reduced. Nevertheless, it cannot be gainsaid that there are situations where the governmental interest in immediate action is great, and a pre-deprivation hearing could only be accomplished at great risk or cost to the public. The very strength of the *Eldridge* balancing test -- and no doubt the reason for its durability -- is that it can accommodate these competing interests. Accordingly, this Court has many times ruled that where the governmental interest is significant and the evidentiary basis of the government's action is powerful and straightforward, an immediate deprivation is permissible. *See, e.g., Federal Deposit Ins. Corp. v. Mallen*, 486 U.S. 230, 240-41 (1988) (suspension of bank officer); *United States v. Von Neumann*, 474 U.S. 242, 248-51 (1986) (customs officials' seizure of

automobile at the border); *Barry v. Barchi*, 443 U.S. 55, 64-66 (1979) (suspension of race horse trainer); *Dixon v. Love*, 431 U.S. 105, 112-15 (1977) (revocation of driver's license); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 678-80 (1974) (seizure of yacht used for unlawful purposes); *North Am. Cold Storage Co. v. City of Chicago*, 211 U.S. 306, 314-21 (1908) (seizure of contaminated food).

Of particular relevance here, the Court has upheld statutes authorizing the government to suspend persons from their employment without a pre-suspension hearing. In *Mallen*, the Court considered the constitutionality of a federal banking statute, 12 U.S.C. § 1818(g)(1), which authorizes the immediate, pre-hearing suspension of an officer and director of a federally insured bank after formally being charged with a felony involving dishonesty or breach of trust. 486 U.S. at 232-35. After Mallen was indicted by a federal grand jury with making false statements to the FDIC and the bank, the FDIC issued an *ex parte* order suspending Mallen and prohibiting him from further participation in any manner in the conduct of the affairs of the bank or in any other FDIC-insured bank. *Id.* at 236-38. In upholding the statute, the Court ruled that "an important government interest, accompanied by a substantial assurance that the deprivation is not baseless or unwarranted, may in limited cases demanding prompt action justify postponing the opportunity to be heard until after the initial deprivation." *Id.* at 240.

As the Court further observed in *Mallen*, suspensions prior to hearings may be appropriate even where the governmental interest is not as weighty as maintaining confidence in our banking institutions. 486 U.S. at 241. In *Barry v. Barchi*, the Court held that the Due Process Clause was not violated by a

statute authorizing summary suspensions of race horse trainers after their horses test positive for certain drugs. 443 U.S. at 64. Because the state "has an important interest in assuring the integrity of the racing" and a testing official affirmed that the petitioner's horse had been drugged, "the State need not postpone a suspension pending an adversary hearing." *Id.* at 65.

In both of these cases, the Court took a hard look at the strength of the government's interest, the weight of its evidence, and the availability of post-deprivation procedures. Summary suspensions based upon weaker evidence or serving lesser governmental objectives may not have fared as well. A categorical, one-size-fits-all rule, such as that proposed by the court below, is inconsistent with these decisions.

C. There Is No Basis In Reason Or This Court's Precedents To Carve Out An Exception To The *Eldridge* Balancing Test For The Deprivation Of Wages Without A Prior Hearing

1. The court below's reliance on *dicta* in *Cleveland Board of Education v. Loudermill* was misplaced

At issue in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), was an Ohio statute which provided that civil servants, regardless of the circumstances, were not entitled to a hearing prior to being terminated for cause. This Court rejected that blanket bar on pre-deprivation procedures. *Id.* at 542-43. The holding in that case in no way conflicts with the position of petitioners here, which is that the government be given the right, on rare occasion, to immediately suspend without pay certain employees. Such a need was found not to

exist in *Loudermill*, where the only alleged wrongdoing was misrepresentation on employment forms submitted years earlier. *Id.* at 545 n.10.

The court below relies on the statement in *Loudermill* that, "in those situations where the employer perceives a significant hazard in keeping the employee on the job, it can avoid the problem by suspending with pay." Pet. App. 11a (quoting *Loudermill*, 470 U.S. at 544-45). This statement is *dicta*, as respondent concedes. Brief in Opposition at 4. Moreover, it does not purport to state a general prohibitory rule. It merely restates the obvious -- that a state which chooses to pay a suspended employee has a stronger case against a procedural due process challenge than a state which does not pay a suspended employee. Simply put, nothing in *Loudermill* compels the conclusion that the *Eldridge* balancing test should be discarded in suspension without pay cases. Indeed, the opinion counsels just the opposite, stating that "[t]here are, of course, some situations in which a postdeprivation hearing will satisfy due process requirements." *Id.* at 542 n.7 (citing *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594 (1950); *North Am. Cold Storage Co. v. City of Chicago*, 211 U.S. 306 (1908)).

It bears mention that the Court in *FDIC v. Mallen* -- issued only three Terms after *Loudermill* -- did not address whether Mallen was suspended without pay. Although Mallen's opening brief on the merits (at 7-8) argued that he was deprived of an "income stream to underwrite" the expense of defending a criminal prosecution during the suspension, the opinion makes no mention of this. The Court plainly did not find dispositive whether or not Mallen was paid during his suspension -- as it would have were respondent's position

correct. Similarly, the suspension in *Barchi* presumably prevented the race horse trainer from earning income during the suspension. See *Barchi*, 443 U.S. at 73 ("[n]ot only does a trainer lose the income from races during the suspension . . . .") (Stevens, J., dissenting). The Court again was not troubled by that prospect.

2. There Is No Principled Basis On Which To Carve Out An "Employee's Pay" Exception

Adoption of a *per se* rule that the Due Process Clause is automatically violated when a state fails to pay a suspended employee without a pre-suspension hearing would elevate a suspended employee's wages above virtually all other property interests. There is no sound reason to do this. Wages are not intrinsically more important than various other property and liberty interests which can on occasion be taken away without a prior hearing; and the government interest in withholding wages is often compelling.

a. The temporary interruption of wages could be far less meaningful to a suspended employee than the fact of the suspension itself. The suspension from work can, in certain circumstances, have various adverse consequences. Yet such a deprivation has been upheld without prior hearings. *See, e.g., Mallen*, 486 U.S. at 240-41; *Barchi*, 453 U.S. at 64-66. Indeed, the court below acknowledged that compelling state interests warranted respondent's immediate suspension and that such a suspension *with* pay would not have violated due process. Pet. App. 11a.

Furthermore, the private interest in receiving wages during a suspension is mitigated by the possibility of receiving

backpay at a later date. *See Sampson v. Murray*, 415 U.S. 61, 90 (1974) ("the temporary loss of income, ultimately to be recovered, does not constitute irreparable injury"). Other interests whose summary deprivation this Court has upheld could not have been remedied so easily. For example, in *Dixon v. Love*, 431 U.S. 105, 113 (1977), the Court upheld the constitutionality of a state's revocation of a driver's license without a prior hearing even though it acknowledged that, "[u]nlike the social security recipients in *Eldridge*, who at least could obtain retroactive payments if their claims were subsequently sustained, a licensee is not made entirely whole if his suspension is later vacated." Similarly, in *Ingraham v. Wright*, 430 U.S. 651, 672-82 (1977), the Court upheld the infliction of corporal punishment without a prior hearing notwithstanding the difficulty in remedying an erroneous infliction.[1]

b. The notion underlying the position of respondent and the court below is that a state lacks a serious interest in the cost of paying suspended employees. This not only is incorrect as a factual matter, but also ignores this Court's express recognition in *Eldridge* that the "due process balance" must take into account "the expense of providing benefits to ineligible recipients pending decision." 424 U.S. at 347. As the Court there observed, "the fact that full benefits would continue until after such hearings would assure the exhaustion in most cases

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[1] *See* Irene M. Rosenberg, *Ingraham v. Wright: The Supreme Court's Whipping Boy*, 78 Colum. L. Rev. 75, 91 (1978) ("Postponement of the hearing in the property context can often be viewed as compatible with the interest implicated, because the property, if wrongfully taken or withheld, can, at a later date, be fully restored. Where a liberty interest is invoked, the injured person is considerably less likely to be made whole by a belated award of damages.") (footnote omitted).

of this attractive option," and that "experience with the constitutionalizing of government procedures suggests that the ultimate additional cost in terms of money and administrative burden would not be insubstantial." *Id.*

To assume that a government can easily absorb the wages of suspended employees ignores the tight budgets on which state and local governments and departments operate and the extent to which many of them are already understaffed. The difficulties to which governments would be placed under the court below's ruling can be demonstrated by the example of a police officer who has been found to be "on the take." If the police department were immediately to suspend the officer -- as public safety warrants -- they would have to pay him until later hearings are conducted. But the cost of paying his salary during the suspension would deprive the department of the funds needed to increase the other officers' hours or hire a replacement officer. This is truly a Hobson's choice: whether to keep a corrupt officer on the streets or have fewer officers on patrol. States have compelling interests in ensuring public safety and in cultivating and preserving confidence in public institutions. The rule proposed by the court below would, in some situations, seriously undermine those interests.

Requiring that all suspended employees be paid pending a hearing, however contemptible their behavior, would adversely affect the workplace in ways beyond mere dollars and cents. It takes little imagination to recognize that morale would be damaged when the employees who have acted within the bounds of the law not only see their malfeasant co-worker getting paid while doing no work, but also see their own workload increase or the quality of the office's services decline as a result. The taxpayers, too, would undoubtedly be outraged

to learn that their tax dollars are going to workers who have been suspended for gross misconduct (and are possibly sitting in jail). This is particularly true where the suspension is based on an evidentiary finding of probable cause by a separate institution, as was the case here.

The states' compelling interests in maintaining flexibility to make personnel decisions, preserving morale among their employees and instilling public confidence in government institutions are illustrated by the following examples. In each case, suspension *with* pay would have been unnecessary and detrimental to the public interest.

- A District of Columbia police officer was suspended without pay following his arrest on sexual assault charges. The suspension was based upon a review of the arrest warrant and affidavits filed in support of the warrant application. The officer was later convicted of grabbing, assaulting and battering his victim. *District of Columbia v. Green*, No. 95-CV-1429 (D.C. Jan. 9, 1997).

- A Rhode Island police officer was convicted of three counts of first degree murder and one count of assault with intent to commit murder for methodically executing three young men at a garage while the victims were working on their cars. At the time of the murders, the officer was suspended without pay after being indicted for assault with a dangerous weapon upon one of the murder victims. *State v. Sabetta*, 680 A.2d 927 (R.I. 1996).

- A New Orleans police officer (Antoinette Franks) and an accomplice robbed a restaurant and shot and killed three people in the process, including another officer. After other

police officers arrived at the scene to investigate the crime, Franks returned to the restaurant and pretended to investigate as well. As it turned out, a child had been hiding in the restaurant during the murders and had witnessed Franks' participation. Franks was arrested and suspended without pay, and later convicted and sentenced to death. *State v. Franks*, No. 375-992 (Orleans Parish Crim. Dist. Ct. 1995).

D. This Case Presents An Excellent Example Of The Rare Case When A State Should Be Permitted To Immediately Suspend An Employee Without Pay

Many of the factors which militate in favor of an immediate suspension without pay are present in this case. Had the court below properly weighed the *Eldridge* factors it would, we submit, have concluded that the state acted in a manner consistent with the Due Process Clause.

Respondent served as a police officer at East Stroudsburg University, a state university. Pet. App. 47a. On the morning of August 26, 1992, the Pennsylvania State Police arrested him on drug related felonies after finding him present in the home of a suspected drug dealer where five pounds of marijuana, scales and half-smoked marijuana cigarettes were present. *Id.* at 49a, 53a. The state police informed the university of respondent's arrest that afternoon; the university immediately suspended him. *Id.* at 49a-50a. As the Third Circuit found, "Homar's arrest on drug charges certainly suffices to ensure that the university's concerns were not baseless or unwarranted, as required by the Supreme Court." *Id.* at 11a (citing *Mallen*, 486 U.S. at 240). Indeed, police may only arrest a person if there is probable cause to believe

he committed the charged offense. *Gerstein v. Pugh*, 420 U.S. 103, 111-14 (1975).

The benefit to respondent of additional procedures would have been minimal. Formal notice of the proposed action was unnecessary because respondent was aware of the reason for the suspension, and in fact asked his superior if he was suspended during his phone conversation the day after the arrest. *Id.* at 50a. Moreover, the fact of his association with a known drug dealer was never questioned.

Weighed against this low risk of erroneous deprivation is the state's paramount interest in the conduct of its police officers. Respondent's misconduct raised particularly serious concerns. With drug use among our nation's youth increasing, the specter of a university police officer participating in illegal drug activities is deeply troubling. To hold that such an officer is entitled to receive his salary after his arrest for such activities sends out precisely the wrong message to the remainder of the police force and the community, and interferes with ongoing law enforcement efforts.

Finally, less than a month after his suspension, respondent received a hearing and was notified that he would receive backpay at the rate of his new position, groundskeeper.[2] Pet. App. 55a. The possibility of obtaining some level of back pay existed from the outset, as it always does when wages are withheld, and lessened the private interest in additional procedures. In sum, the risk of erroneous deprivation was

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[2] Following further meetings with respondent's union representatives, petitioners later agreed to give respondent back wages at his original police officer salary. Pet. App. 55a-56a.

small; the governmental interest in suspending respondent without pay was significant; and backpay reduced the private interest. Taken together, the balance weighs in the government's favor -- the Constitution did not require that respondent be paid during his suspension.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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